BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHARLES D. KEENE, II Claimant	)	
VS.	)	Docket No. 1,056,932
STONE MASONS, INC. Respondent	)	
AND	)	
NETHERLANDS INS. CO. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant appealed the December 2, 2011, preliminary hearing Order entered by Administrative Law Judge (ALJ) Thomas Klein. Kenton D. Wirth of Wichita, Kansas, appeared for claimant. Daniel S. Bell of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the November 10, 2011, preliminary hearing and exhibits thereto, and all pleadings contained in the administrative file.

ISSUES

At the preliminary hearing, claimant requested continuation of temporary total disability benefits and continued authorization of Dr. Matthew N. Henry to treat claimant's low back and neck injuries. In his preliminary Order, ALJ Klein determined claimant's injuries did not arise out of and in the course of his employment with respondent and, therefore, denied claimant's request for continued medical treatment and temporary total disability benefits. Claimant asserts the ALJ erred by making that finding. Claimant alleged in his Application for Hearing filed on July 28, 2011, that he injured his ribs, back, neck and all related body parts as the result of repetitive trauma through June 6, 2011, when he fell from a semitrailer. Respondent contends the ALJ's Order should be upheld. In his Application for Review claimant stated, "Claimant wishes the Board to review the

issue of whether he sustained personal injury by accident arising out of and in the course of his employment with respondent."[1] After a review of the record, this Board Member finds the issues are as follows:

1. Is a recording of a telephone call to a 911 dispatcher part of the record on appeal? Respondent's Exhibit 7 to the preliminary hearing was a CD purported to contain a recording of a telephone call to a 911 dispatcher. When this Board Member attempted to listen to the CD, it was blank. Respondent's attorney sent this Board Member an electronic copy of the recording to review. Claimant's attorney asserts this Board Member should not consider the recording as part of the appeal.

2. Did claimant suffer a personal injury or injuries by repetitive trauma arising out of and in the course of his employment?

3. Did claimant suffer a personal injury or injuries by accident on June 6, 2011, arising out of and in the course of his employment?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant began working for respondent in 2000 as an equipment operator, but became a truck driver on September 11, 2001. Although he was primarily a truck driver, claimant also was a laborer for respondent, which required lifting stone, brick and bags of mortar; mixing mortar; and erecting and tearing down scaffolding. The items he lifted would weigh anywhere from one pound up through ninety pounds. Claimant would not do paperwork, as he can neither read nor write.

On June 6, 2011, claimant was loading a truck at respondent's place of business in Kechi, Kansas. Attached to the truck was a trailer which held a "Skytrak," which is a piece of equipment. Claimant was going to unload the Skytrak so he could take a load of materials to a job site. Claimant was climbing into the cab of the Skytrak when he slipped from a step on the Skytrak. He initially held onto the Skytrak with his left hand, slammed his left side into it and then fell four to five feet to the ground.[2] There were no witnesses to the incident. Claimant finished unloading the Skytrak and loading materials onto the trailer. Claimant drove the truck to a job site where he told Jerome Herman, the site supervisor for respondent, about the accident. As claimant drove back to Kechi, he called John Born, an owner of respondent, and Michael C. Swart, claimant's immediate

[1] Application for Review at 1 (filed Dec. 8, 2011).

[2] P.H. Trans. at 72.

supervisor, and told them about his fall. Upon returning to respondent's office in Kechi, claimant told Mitchell Born, another owner, about the accident. Mitchell Born directed claimant to go home and ice the injury.

Early the next morning claimant's wife took him to the emergency room at Wesley Medical Center (Wesley) because he could not breathe and was hurting badly. The report from that visit indicated claimant denied any tenderness to the cervical, thoracic or lumbar vertebrae. Claimant was x-rayed, given medication for pain and told to see his family physician. Dr. David L. Acuna, the physician on duty, diagnosed claimant with a fractured left posterior ninth rib as well as some midthoracic compression fractures which were chronic on imaging.[3] That same day, claimant saw his family physician, Dr. Denis Knight. Claimant told Dr. Knight that during his fall his left chest struck the floorboard of the tractor. According to claimant, he was advised by Dr. Knight to file a claim for workers compensation.

In 2008, while working for respondent, claimant had neck problems. Claimant testified he eventually had bones in his neck fused by Dr. Grundmeyer and returned to work two weeks after surgery. This surgery was paid for by claimant's health insurance. Claimant alleged the neck injury was caused by his repetitive work activities, but he did not file a workers compensation claim because he did not want to cause friction. When he returned to work, he performed his normal job duties. Claimant testified, "My neck was great for the longest time and then my neck started hurting again, and then when I fell off this truck it constantly hurts now the same way it did before I had the surgery."[4]

Claimant testified that before his fall on June 6, 2011, he had intermittent mild aching in his neck. After the accident, he had sharp pain in his neck, a headache on his right "globe"[5] and had difficulty turning his head to the right. He also had constant pain in the center part of his back on the right side radiating down his right leg. Claimant testified that the fall aggravated his neck condition.

Claimant went to respondent's office "[a] day or so after,"[6] and office administrator Gelane White completed an accident report. The Employer's Report of Accident, which is dated June 8, 2011, indicated that claimant slipped on a step, fell to the left side, left hand still hanging on, and he hit the side of his body.[7] Respondent then sent claimant to

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[3] *Id.*, Cl. Ex. 2

[4] *Id.*, at 24.

[5] *Id.*, at 25.

[6] *Id.*, at 22.

[7] *Id.*, at 44 and Resp. Ex. 1.

Dr. Romeo Smith for treatment. He first saw claimant on June 8, 2011. At that appointment, claimant complained of pain in the left upper ribs, mid chest and lower back, with some difficulty breathing. Dr. Smith diagnosed claimant with a fractured left ninth rib and a lumbar contusion. He released claimant to work on June 13, 2011, with temporary restrictions of no lifting more than ten pounds and sit-down duties with limited repetitive bending or lifting.

At the request of Dr. Smith, claimant underwent thoracic and lumbar MRIs on June 28, 2011. On July 1, 2011, Dr. Smith went over the MRI results with claimant. The thoracic MRI was unremarkable with no evidence of disc herniation, bulge or canal stenosis. Dr. Smith's report does not mention a compression fracture of the thoracic spine. The lumbar MRI indicated degeneration in the lower lumbar spine, less prominent at the L4-L5 level as well as L3-L4. At L4-L5 there was broad-based disc bulging with mild canal narrowing and some facet joint degenerative change. At L3-L4 there was some facet joint degenerative change with mild disc bulging which was not causing significant canal or neuroforaminal stenosis. Claimant reported that his rib pain was better, but complained of neck pain. Dr. Smith indicated claimant would have to talk to HR to see if they would add neck pain to his case. Claimant was referred to Dr. Amitabh Goel for further evaluation and treatment of his lower back.

Claimant saw Dr. Goel on July 25, 2011. He diagnosed claimant with low back syndrome, lumbar degenerative disc disease, lumbar spondylosis, symptomatic facet arthrosis, thoracic degenerative disc disease, thoracic spondylosis and a history of prior cervical surgery with cervical spondylosis. Claimant reported to Dr. Goel that his neck and back pain was an eight on a scale of one to ten, with zero being no pain and ten the worst pain. Dr. Goel indicated claimant could return to full work duties. Dr. Goel indicated that he could not see any specific injury to claimant's discs from his work-related injury.[8]

With the approval of claimant's nurse case manager, Dr. Smith referred claimant to Dr. Matthew N. Henry at Abay Neuroscience Center. Dr. Henry saw claimant on August 16, 2011, and recommended a cervical spine MRI and a CT scan of the cervical spine. Dr. Henry indicated claimant had neck pain radiating into his right biceps and forearm with numbness in his hands and some difficulty with gripping. He took claimant off work for two weeks, but indicated claimant could return to work on August 30, 2011, with restrictions of no lifting more than ten pounds frequently or occasionally; no excessive and/or repeated bending and/or twisting of the lower back; no kneeling/squatting/stooping/crawling/climbing; and no driving. Dr. Henry also prescribed medications, epidural steroid injections in the lumbar spine and physical therapy. On September 27, 2011, Dr. Henry signed a work release that stated claimant was released from work until October 18, 2011. On November 9, 2011, Dr. Henry signed another work

[8] *Id.*, Cl. Ex. 4.

release that indicated claimant should continue with his current restrictions, and that surgery authorization was pending.

Respondent sent claimant a letter dated August 9, 2011, offering claimant a job as a laborer based upon Dr. Goel's release to work with no restrictions. Because claimant's driver's license was suspended as a result of a conviction of driving under the influence of alcohol, he could no longer be a driver for respondent. Claimant testified that the job duties required of a laborer would exceed the restrictions given to him by Dr. Henry. He also testified that in his opinion, there was no job in the open labor market that he could do in his present physical condition.

At the preliminary hearing, claimant was asked by respondent's counsel if police were called to his home on June 4, 2011, because of an altercation. Respondent learned about the 911 call from an anonymous telephone call to its office. Claimant denied such an incident occurred. Respondent's counsel then played a digital recording of the 911 call. Apparently, the recording was on a "Smart Phone."[9] Respondent's counsel asserted claimant was heard on the recording complaining of pain to the ribs or side area, not being able to twist and complaining of back pain.[10] Claimant's injuries were allegedly caused by his son.

Because the voices on the recording were difficult to understand, it was played a second time at the preliminary hearing. Claimant at first testified ". . . that wasn't me crying around there"[11] on the recording. He then testified he was drunk at the time and did not recall what happened. Claimant testified that neither he, nor anyone in his house on June 4, 2011, went to the hospital or to jail as a result of the incident.

Respondent introduced eight exhibits at the preliminary hearing. The following exchange took place between the attorneys and the ALJ:

> MR. BELL: Thank you. Nothing further. Oh, actually, I would like to admit the exhibits, respondent's exhibits. We would offer Exhibits 1 through 8. I'll get them together.
>
> MR. WIRTH: No objection for the purposes of preliminary hearing, Your Honor.
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> THE COURT: They are admitted if you can find them.

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[9] *Id.*, at 54.

[10] *Id.*, at 48-49.

[11] *Id.*, at 55.

> MR. BELL: I think I can. I have got some witnesses, Judge. I didn't know if you want to take a quick break.[12]

This Board Member attempted to listen to the CD attached to the preliminary hearing transcript as Respondent's Exhibit 7. The CD is labeled with a marker as "6/4/11 911 Call" and "3610 N. Arkansas."[13] However, the CD was blank. In an effort to determine why the CD was blank, this Board Member e-mailed counsel for the parties, the court reporter who recorded the preliminary hearing, the ALJ and the ALJ's legal assistant. Respondent's attorney indicated that at the preliminary hearing he played the 911 recording from his computer. However, he was unable to transfer the recording to a CD. Respondent's attorney then sent an electronic recording by e-mail to this Board Member to review. Claimant's position is that respondent failed to submit the appropriate exhibit and, therefore, this Board Member should not consider the recording as part of the appeal. For the reasons explained below, the recording was considered as a part of the record.

The voices on the recording are difficult to understand and much of what was said by those recorded is unintelligible. A male voice, presumably that of claimant, says he hurts and that his side is hurt. He also said that his back is hurt or is being hurt. That person's voice was very slurred. A female voice, who is obviously distressed, repeatedly asks the male what is wrong. A second male voice warns that the first male should not be twisted. In his Order, the ALJ indicated the entire 911 call was not placed into evidence because the first part of the recording presumably contained information identifying the caller and the reason for the call.

Gelane White, office administrator for respondent, testified that on June 8, 2011, she completed an Employer's Report of Accident based upon what claimant told her. She testified claimant was primarily a truck driver. According to Ms. White, claimant never told her that he suffered a work-related, repetitive injury. The Employer's Report of Accident indicates claimant injured himself when he climbed the step of the Skytrak and slipped and fell. Prior to June 8, 2011, claimant never told her of any work-related injury to any part of his body. Ms. White indicated that on June 8, 2011, claimant and his wife came to respondent's office to report the accident. Ms. White believed there were inconsistencies in what claimant was telling her. She did not notice claimant having any lacerations, abrasions or contusions.

On October 24, 2011, Ms. White's office assistant took an anonymous telephone call from a man. The caller told Ms. White's assistant about the June 4, 2011, incident at claimant's home. Ms. White investigated and was able to obtain a digital recording by e-mail of the 911 call from an emergency communications person. She listened to the recording and identified claimant's voice.

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[12] *Id.*, at 79.

[13] *Id.*, Resp. Ex. 7.

Michael C. Swart testified that claimant spent 70% of his time driving a truck for respondent, but would perform other duties. He stated that at about 4:30 p.m. on June 6, 2011, claimant called him and told him about falling. Mr. Swart listened to the recording of the 911 call and testified he could hear claimant moaning. Mr. Swart testified that prior to June 6, 2011, claimant never told him of any work-related injury to any part of his body. Mr. Swart also testified that after claimant fully recovered from his 2008 neck surgery, claimant was able to perform all job duties assigned him.

Mr. Swart testified that during the last eight to ten years, claimant had reported, or Mr. Swart had observed, evidence of physical injuries to claimant's head, neck, back and torso. These injuries occurred approximately every three to four months and were caused when claimant was hurt by a family member. On one occasion during the past year, claimant's son beat him and Mr. Swart drove claimant to Wesley Crisis Shelter. According to Mr. Swart, claimant reported his wife would beat him while he was sleeping.

In his Order, the ALJ indicated claimant requested that ". . . Dr. Henry be authorized for low back and rib complaints."[14] However, the ALJ's Order does not mention claimant's request that Dr. Henry be authorized to treat claimant's neck condition. The ALJ found claimant did not prove his injuries arose out of and in the course of his employment with respondent. The ALJ stated in his Order:

> The court is in doubt about the mechanism of injury. The court acknowledges that the claimant has told a consistent story to all parties from the beginning of the case. However, there is a dispatch tape which may indicate that the claimant was injured in another way. . . . Without a clearer understanding of the events of June 4, 2011 the court must preliminarily finds *[sic]* that the claimant has failed to prove that his injury has arisen out of and in the course of his employment and his requested benefits are denied pending further hearing.[15]

PRINCIPLES OF LAW

The 2011 legislative session resulted in amendments to the Workers Compensation Act. L. 2011, Ch. 55, Sec. 1 provides in relevant part:

> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

L. 2011, Ch. 55, Sec. 5 provides in relevant parts:

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[14] ALJ Order (Dec. 2, 2011) at 1.

[15] *Id.*, at 2.

(d) “Accident” means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. “Accident” shall in no case be construed to include repetitive trauma in any form.

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

. . . .

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

> (3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:
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> (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
>
> (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
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> (iii) accident or injury which arose out of a risk personal to the worker; or
>
> (iv) accident or injury which arose either directly or indirectly from idiopathic causes.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[16] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[17]

ANALYSIS

This Board Member will consider the telephone call to the 911 dispatcher as part of the record. At the preliminary hearing, claimant's attorney had no objection to the recording being made part of the record. The fact that the CD attached as Respondent's Exhibit 7 was blank is in the nature of a clerical error. It is clear from the language in his Order that the ALJ considered the 911 telephone call as part of the record. The recording was played twice at the preliminary hearing for all to hear.

Claimant alleges he suffered a series of repetitive traumas up through June 6, 2011, when he fell from a semitrailer. Following the fall, medical providers diagnosed claimant with cervical, thoracic and lumbar spine problems as well as a broken left ninth rib. In 2008, claimant had a serious operation to his neck. Although he did not file a workers compensation claim, he testified the injury was work related.

In his Order, the ALJ omitted the fact that claimant requested medical treatment for an alleged neck injury. Claimant has steadfastly maintained that he suffered neck injuries as a result of repetitive traumas and/or the accident on June 6, 2011. Drs. Smith, Goel and Henry stated in their reports that claimant complained of neck pain. Dr. Goel indicated that claimant reported neck pain at an intensity of eight on a scale of one to ten, with zero being no pain and ten the worst pain.

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[16] K.S.A. 44-534a.

[17] K.S.A. 2010 Supp. 44-555c(k).

Claimant failed to prove by a preponderance of the evidence that he suffered personal injuries by repetitive trauma arising out of and in the course of his employment with respondent. Claimant was primarily a truck driver for respondent from September 11, 2001, until his fall. He did not specifically testify that his repetitive activities as a truck driver caused his neck and back injuries. Nor did claimant present sufficient evidence that he repetitively performed jobs as a laborer such as lifting brick and stone. Claimant failed to meet his burden of proving his injuries were the result of repetitive work-related activities as a laborer and/or truck driver.

Claimant also asserted that he suffered injuries as a result of the fall on June 6, 2011. Respondent contends claimant broke his rib two days earlier in a domestic altercation. In the recording it appears claimant complained that his side was hurt, but did not state which side of his body was hurt. Following the June 4, 2011, incident at his home, claimant never sought medical treatment. There was no evidence presented that claimant appeared injured after the June 4, 2011, incident at his home and prior to his accident on June 6, 2011. He also testified that he was not hurt as a result of the June 4, 2011, altercation. On June 7, 2011, claimant saw two medical providers who indicated he had a broken left ninth rib. In his Order, the ALJ indicated claimant told a consistent story to all parties. Within a few hours after he fell, claimant reported his accident and injuries to four different supervisors.

After listening to the recording several times, this Board Member could not understand much of what was said by the persons speaking. There was a great deal of screaming and yelling by the persons recorded. The voice purported to be that of claimant was very slurred. The recording has very little probative value. This Board Member is not convinced that respondent presented sufficient evidence to prove the incident on June 4, 2011, caused claimant's injuries.

Respondent also asserted that prior to June 6, 2011, claimant suffered head, neck, back and torso injuries resulting from domestic abuse which occurred every three to four months. However, respondent presented no evidence that claimant received medical treatment for those injuries. Nor was there evidence that claimant missed work as a result of those incidents.

This Board Member finds that claimant sustained a personal injury or injuries by accident arising out of and in the course of his employment with respondent on June 6, 2011, and reverses the decision of the ALJ. It is the duty of the ALJ to determine what specific injuries claimant suffered as a result of the fall on June 6, 2011, and what, if any, of claimant's past medical bills should be paid by respondent and what, if any, medical treatment and temporary total disability benefits are appropriate. Therefore, this Board Member is remanding this matter to the ALJ for further findings consistent with this Order.

CONCLUSION

1. The recording of the telephone call to a 911 dispatcher is part of the record for this preliminary hearing.

2. Claimant failed to prove by a preponderance of the evidence that he suffered a personal injury by repetitive trauma arising out of and in the course of his employment with respondent.

3. Claimant sustained a personal injury or injuries on June 6, 2011, by accident arising out of and in the course of his employment with respondent.

WHEREFORE, the undersigned Board Member affirms in part and reverses in part the December 2, 2011, preliminary hearing Order entered by ALJ Klein and remands this matter to the ALJ for further orders consistent with the above. Specifically, this Board Member concludes:

1. The ALJ's finding that claimant did not suffer a personal injury by repetitive trauma arising out of and in the course of his employment with respondent is affirmed.

2. The ALJ's finding that claimant did not sustain a personal injury or injuries by accident on June 6, 2011, arising out of and in the course of his employment with respondent is reversed.

IT IS SO ORDERED.

Dated this ____ day of March, 2012.

THOMAS D. ARNHOLD
BOARD MEMBER

c: Kenton D. Wirth, Attorney for Claimant
Daniel S. Bell, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge